Supreme Court, U.S.
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No.

# In The
# SUPREME COURT OF THE UNITED STATES

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**JOHN WALTER NELSON,**
**Petitioner,**
**v**

**THE PEOPLE OF THE STATE OF COLORADO**

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## ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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## PETITION FOR WRIT OF CERTIORARI

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**GARY L. CALDER, Colorado Reg. # 2464**
**Attorney of record in this Court for the Petitioner**
**609 North Emerald Drive**
**Key Largo, FL 33037**
**(305)853-5765**

**STEPHEN P. CALDER, Colorado Reg. #8220**
**Trial Counsel**
**2851 So. Parker Rd., Suite 400**
**Aurora, CO 80014**
**(303) 751-9462**

## QUESTION PRESENTED FOR REVIEW

**MAY A TRIAL COURT RUN DOWN THE CLOCK, SO TO SPEAK, ON AN ACCUSED'S SPEEDY TRIAL PERIOD, BY MULTIPLE POSTPONEMENTS OF THE TRIAL TO WITHIN SEVEN BUSINESS DAYS OF THE DEADLINE, AND THEN PROCLAIM A DEFENSE WAIVER OF SPEEDY TRIAL AFTER REFUSING TO REASONABLY ACCOMMODATE THE DEFENSE IN RESCHEDULING TRIAL WITHIN THE DEADLINE ?**

## LISTING OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

**The Petitioner is John Walter Nelson, the defendant below in Douglas County Court, Colorado, case number 99 M 999.**

**The judge presiding over said prosecution whose order denied defendant's Motion to Dismiss on speedy trial grounds was The Honorable Susanna Meissner-Cutler, sitting in division B of the Douglas County Court, a court having jurisdiction over misdemeanor criminal matters.**

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## STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

**THE DATE THE ORDER SOUGHT TO BE REVIEWED WAS ENTERED:**

**On February 28, 2001, the Colorado Supreme Court, EN BANC, denied a Petition for Rule to Show Cause which would have, had it been granted, directed the trial court to show cause why the prosecution should not be dismissed on speedy trial grounds.**

**THE STATUTORY PROVISION BELIEVED BY PETITIONER TO CONFER ON THE SUPREME COURT OF THE UNITED STATES JURISDICTION TO REVIEW THIS MATTER ON WRIT OF CERTIORARI:**

**28 USC 1331, pertaining to federal question jurisdiction, confers jurisdiction on this Honorable Court to entertain this petition. The federal question raised by this case concerns an accused's rights under the United States Constitution to a speedy trial.**

**THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:**

**1. Amendment VI to the Constitution of the United States:**

**"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."**

**2. Amendment XIV to the Constitution of the United States:**

**"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

**3. Colorado Revised Statutes section 18-10-405, Speedy Trial:**
**"(1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months**

**from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode."**

**(6) In computing the time within which a defendant shall be brought to trial as provided in subsection (1) of this section, the following periods of time shall be excluded:**

> **(f) The period of any delay caused at the instance of the defendant;**
> **[only pertinent subsections cited]**

## STATEMENT OF THE CASE

**On or about May 24, 1999, the Petitioner was cited with a Uniform Summons and Complaint alleging that he had committed the offenses of Harassment and Domestic Violence. Charges were subsequently filed in the Douglas County Court, Colorado, Division B, The Honorable Susanna Meissner-Cutler, under case number 99 M 999, People vs John W. Nelson.**

**Pleas of not guilty were accepted by the Court on June 9, 1999 and the matter was set for jury trial, motions hearing and trial call.**

**The trial court calculated the speedy trial deadline as expiring December 8, 1999 (Appendix I, p.19 ln 27) [1] in observance of Colorado's six month speedy trial statute, CRS 18-10-405, set forth in pertinent part above.**

**The case was set for jury trial on two separate occasions only to be continued on the Court's motion on account of docket congestion both times (Appendix I, pp. 19-20). The first such trial setting was October 18, 1999 and the second was November 29, 1999, only 9 days, seven business days, before the expiration of the speedy trial deadline. Petitioner and his counsel prepared each of these two times for trial and appeared at each of the mandatory trial call appearances associated therewith. Both times counsel was ready with witnesses and exhibits only to learn that other cases would be given priority. At the November 24, 1999 trial call for the second trial date, when informed that another**

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**1 For purposes of this Petition only, Petitioner will adopt this position regarding when speedy trial commenced but reserves the right to raise alternative theories as to the speedy trial commencement date on appeal should there be a trial and conviction below. Indeed, Petitioner asserted the alternate theory in the trial court and in the Rule 106 review (but not in the Colorado Supreme Court) that using another arguably applicable commencement date for the start of the speedy trial period resulted in the expiration of the deadline before the December 6, 1999 offered trial date. Petitioner has chosen not to pursue that alternative theory here.**

**case had priority for November 29th, undersigned counsel, trying to accommodate the court and have the case tried in a timely fashion, informed the Court that he and his client would nevertheless appear on November 29th in hopes that the other case might settle or otherwise finish early. Counsel specifically informed the Court that he would be willing to trail the other case as well, as time would then be running short to reset the case within speedy trial (Appendix I, p. 20. ln. 16). The Petitioner and counsel appeared and announced ready on November 29, 1999. (Appendix II, p.1 ln.9)**

**On November 29th, the trial court, on its own motion and as a result of another trial which was to start that day, vacated Petitioner's trial for the second time and proceeded to reschedule it. Nothing was said by the trial court about trailing. The Court offered only one trial date before the December 8, 1999 expiration of the speedy trial period and that was one week hence on the following Monday, December 6, 1999. (Appendix II, p.1 ln. 8-15) Petitioner's trial counsel, a solo practitioner, having appeared twice and announced ready for trial each time, and with an ever narrowing window within which to try this case, found himself in a setting conflict with the December 6, 1999 date having long previously been scheduled for a bond appearance on a criminal case in Denver County Court. Trial counsel explained to the Court the nature of the scheduling**

**conflict. (Appendix II, p.1 ln. 16-18)**

**Petitioner's trial counsel then offered to try the case on Thursday December 2, 1999 or Friday December 3, 1999, both dates within the speedy trial deadline (Appendix II, p.1 ln 21-27). The trial court declined to offer either of those two dates stating that jury trials were started only on Mondays (Appendix II, p.1 ln 28). Despite counsel's efforts to secure an alternate date within the deadline, no other date within the speedy trial deadline, besides the December 6th date, was offered by the trial court. (Appendix II, pp.1-4) Petitioner's trial counsel then reluctantly accepted a date outside of the deadline only after registering an objection to that setting as being in violation of Petitioner's speedy trial rights. (Appendix II, pp.1 ln. 22 and p. 2 ln. 11). The objection was noted. Ironically, that date, January 6, 2000, was a Thursday, contrary to the trial court's stated limitation of only setting jury trials on Mondays. (Appendix II, p. 2 ln. 6)**

**Petitioner filed a timely Motion to Dismiss on speedy trial grounds pursuant to Colorado Revised Statutes section 18-1-405 and Rule 48, (Colorado) Criminal Procedure, on or about December 15, 1999. This motion was denied by the Court after oral argument, on January 6, 2000. (Appendix I, p. 27 ln. 22) The Petitioner then asked for and received a continuance of the jury trial to afford him time to commence proceedings in the Douglas County District Court pursuant to Colorado**

**Rule of Civil Procedure 106 for writ of prohibition whereunder the District Court may review orders of the inferior County Court. (Appendix I, pp. 27 ln. 25 through p. 28 ln. 3) The Douglas County District Court denied Rule 106 relief by written order dated January 30, 2001. (Appendix III) The Petitioner then filed a timely petition in the Colorado Supreme Court pursuant to Colorado Appellate Rule 21, seeking a Rule [ie: order] to Show Cause why the prosecution should not be dismissed, which petition raised the identical issue raised in the instant petition. The Colorado Supreme Court denied the petition without opinion on February 28, 2001. (Appendix IV)**

## ARGUMENT

**The Petitioner urges this Honorable Court to review this case on Writ of Certiorari because the Colorado courts, including its highest court, have decided an important question of federal law, to wit: the right to a speedy trial, in a way which conflicts with the letter and spirit of that law as it has developed through decisions of the United States Supreme Court. In particular, the Petitioner submits that the way in which the courts below have interpreted and applied the concept of "delay attributable to the defense" is repugnant to his constitutional speedy trial**

**rights.**

**This Court's decision in *Klopfer v State of North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L.Ed. 2d 1 (1967) made the Sixth Amendment to the Constitution and its speedy trial provisions applicable to the states by way of the Fourteenth Amendment. The landmark case of *Barker v Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) provided us with the "balancing test" and a wealth of other principles applicable to speedy trial. In *Barker* at page 523, Justice Powell observes that it is up to the states to prescribe reasonable speedy trial provisions consistent with constitutional standards.**

**Under the Colorado statute, CRS 18-1-405 (1) and (6), set forth verbatim *supra* , pp. 2 and 3, if the accused is not brought to trial within six months after entry of a plea, the charges must be dismissed with prejudice absent one of the enumerated exceptions prolonging the period. One such exception is for delays attributable to or at the instance of the defense, CRS 18-1-405 (6). The question raised by this petition is whether, under the circumstances extant, the trial court infringed upon the Petitioner's speedy trial rights when it attributed the delay in getting this case to trial to the defense.**

**The *Barker* case, *supra*, introduced four factors to be considered and "balanced" while making the determination of whether an accused's speedy trial rights have been infringed. Those factors were (1) the length of**

**the delay, (2) the reasons for the delay, (3) whether and when the accused asserted his speedy trial right, and (4) whether the accused was prejudiced by the delay, *Barker, supra* at p.530. While the trial court below recognized the existence of the "balancing test", it nevertheless omitted, in its ruling, to apply. (Appendix I, pp. 21 ln. 24 through p. 25 ln. 5)**

**Analysis of the length of the delay is somewhat circumscribed by the statute which prescribes the period as being six months from entry of the plea [of not guilty]. Colorado's statute is also quite specific that an unexcused infraction of that deadline calls for dismissal. In the case at bar there is no doubt that the six month period was exceeded by the January 6, 2000 trial setting.**

**The reason(s) for the delay make up the greatest arena for disagreement in the instant case. In a very real sense, the trial court painted the Petitioner [and his counsel] into a corner by continuing the trial well into the eleventh hour and then blocking all the viable exits. While docket congestion is viewed as a "more neutral" reason for delay than, say, a deliberate attempt at delay by the prosecution, as Justice Powell said in *Barker*, at p. 531, "... it nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." [emphasis supplied] The Colorado courts seem to want to look at delays ostensibly attributable to the defense with unbending**

**disregard for the circumstances surrounding and, as in the case at bar, giving rise to the delay. But because speedy trial issues are, in the words of Justice Powell, "so slippery", *Barker*, at p. 522, an *ad hoc* approach must be taken in applying the balancing test, *Barker*, at p. 530. Here, the trial court believed, and the higher Colorado courts apparently agree, that a court's responsibility is satisfied by the mere offer of a trial date, any date, within the deadline, and if that date is not workable, regardless of the circumstances or who is responsible for them, it is a waiver of speedy trial. (Appendix I, p. 27 ln. 6 -18) In so believing, the trial court ignored how its own docket practices narrowed and virtually closed the defendant's window of setting options. The knock out punch was the court's utter refusal to grant realistic accommodation to the defense in trying to resolve the predicament which the court had created.**

**The Petitioner assets that, under the circumstances of this case, for the trial court to declare that a "waiver" of speedy trial had occurred when defense counsel did not accept the date offered tortures the meaning of the term "waiver". Trial counsel was literally between a rock and a hard place through no fault of his own. How can a waiver arise out of a circumstance where there is no viable choice? This Court has defined waiver, in the context of a fundamental right, as "intentional relinquishment or abandonment of a known right or privilege." *Barker*, at p.**

**525, citing *Johnson v Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co. v Kennedy*, 301 U.S. 389, 393, 75 S.Ct. 809, 812, 81 L. Ed. 177 (1937), *Sweet v Myers*, 612 P. 2nd 75 (Colo. 1980). In the case at bar, trial counsel, who had exhibited nothing if not good faith in trying to get this case tried in a timely fashion, was put upon the horns of a dilemma: Either fail to appear at a criminal court setting in Denver the morning of December 6, 1999, which was a bond appearance, thereby jeopardizing the interests of another client, or reject the December 6, 1999 trial date. A "waiver" of an important Constitutional right should not be predicated upon a "choice" into which one is forced trough no fault of his own while the responsible party enjoys the luxury of having to make no accommodations.**

**Each continuance which the trial court imposed caused the setting window to shrink while magnifying the prospects of a setting conflict. With all due respect [2], the trial court,**

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**2 Petitioner and counsel mean no disrespect to the trial court by this assertion. The trial, through no fault of its own, has a very congested docket and heavy trial schedule and is doing the best it can under the circumstances. What is meant by Petitioner's assertion is that as between the Petitioner and the trial court, none of the blame for the scheduling difficulties leading up to and including November 29, 1999 were**

**having caused the predicament by twice continuing the case, did not do enough to help find a solution. It would not trail the case. It would not make an exception to its "jury trials are only started on Monday" rule [though curiously, the trial date ultimately taken, January 6, 2000, was a Thursday]. It would not accept two alternate trial dates suggested by the defense within the deadline. In short, it would not consider spreading the inconvenience of its congested docket among other defendants, as had been done twice to this defendant. Instead, the trial court put all of the consequences of its congested docket on the shoulders of this defendant and then called it a "waiver" when defense counsel was forced to pick a long-standing court commitment over a short-notice trial setting.**

**In its ruling denying Petitioner's Motion to Dismiss on speedy trial grounds, the trial court relied upon several Colorado appellate cases which stood for the proposition that unavailability of defense counsel for any trial date offered within the deadline was tantamount to a waiver by the accused of his speedy trial rights. (Appendix I, pp.26 ln 2 through p.27 ln 1) Those cases are distinguishable factually from the case at bar in that in none of the cited cases does**

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**attributable to the Petitioner, except to the extent that his case was part of the pool of cases with which the trial court had to deal.**

**responsibility for the delay rest so squarely with the trial court. Those cases include the case of *People v. Wilson*, 972 p.2d 701 (Colo. App. 1998, Cert. denied 3-1-99), relied upon by the trial court in its ruling (Appendix I, pp.26 ln. 23 through p. 27 ln. 6) which involved a defense attorney whose reason for unavailability for the date within speedy trial which was offered was his vacation plans. In the case of *People vs. Chavez*, 779 P.2d 375 (Colo. 1999), relied upon by the trial court in its ruling (Appendix I, p.26 ln. 24), defense counsel could not, incredibly, find a single date within the month-and-a-half window then left of speedy trial to which the case could be scheduled. In none of the cases cited by the trial court [in its ruling or in its pleadings in the Rule 106 proceeding] did any of the defense counsel offer to make reasonable accommodations to the court in an effort to avoid the stand-off, as counsel did in the case at bar. In none of those cases was defense counsel in court and ready to go for the two previous trial settings only to be bumped to within 9 days [7 business days] of the end of the speedy trial deadline through no fault of his or the accused's. Yet despite having these distinctions pointed out to them, neither the District Court, sitting in review of the trial court, (Appendix III, p. 2, para. 2 through end) nor the Colorado Supreme Court, (Appendix IV, denying Rule to Show Cause without opinion) would consider the circumstances underlying how and why defense counsel had**

**been placed in the position to have to reject the only date within the deadline offered by the trial court.**

**The third factor in the "balancing test" is whether and when the accused asserted his speedy trial right. Here there is no issue as to that since it is clear that the Petitioner showed up ready for trial each of the two times it was scheduled, and objected on speedy trial grounds to the scheduling of the January 6, 2000 trial date.**

**The fourth and final factor is whether the accused suffered any prejudice by the delay. The Petitioner submits that this factor, like the first, is somewhat circumscribed by the fact that the Colorado statute expressly provides for dismissal with prejudice if the speedy trial period is not observed. No specific showing of prejudice is required in that prejudice resulting from such a delay is assumed. This court in *Barker*, at p. 532-533, identified some of the interests which might be prejudiced by a delay in proceeding to trial. Although the Petitioner was not incarcerated pending trial and no witnesses disappeared, there are other immeasurable consequences to delay such as fading memories, changes in the status or relationships with witnesses, restraints on the accused's liberty (eg: bond conditions, "no contact orders", and restraints on certain types of activity such as possessing firearms), and the ever present interest an accused has in getting out from under the cloud of anxiety, suspicion, and**

**hostility that a pending prosecution creates, *Barker*, at p. 533. In *Moore v Arizona*, 414 U.S. 473, 94 S. Ct. 188, 38 L. Ed 2d 183 (1973) this Court indicated that it is "fundamental error" to say that a defendant cannot prevail on a speedy trial issue unless he makes an affirmative showing of prejudice. And in *Barker*, at p. 533, this Court said, "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."**

**In conclusion, the Petitioner argues that an application of the "balancing test" to the circumstances of the case at bar justify the conclusion that his speedy trial rights have been infringed by the trial court's rigid application of the "defense delay" notion. Accordingly, the Petitioner urges this Honorable Court to grant certiorari so that it may fully consider the merits of this claim.**

**Respectfully Submitted,**

**GARY L. CALDER, Colorado Reg. # 2464**
**Attorney of record in this Court for Petitioner**
**609 North Emerald Drive**
**Key Largo, FL 33037**
**(305)853-5765**

**STEPHEN P. CALDER, Colorado Reg. # 8220**
**Trial Counsel for Petitioner**
**2851 South Parker Road, Suite 400**
**Aurora, CO 80014**
**(303) 751-9462**